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AND
BRIEFS

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Nos. 09-958, 09-1158, and 10-283

In the Supreme Court of the United States

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *et al.*, *Petitioners*,

v.

CALIFORNIA PHARMACISTS ASSOCIATION, *et al.*, *Respondents*.

TOBY DOUGLAS, DIRECTOR OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, *Petitioner*,

v.

SANTA ROSA MEMORIAL HOSPITAL, *et al.*, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *DOMINGUEZ* RESPONDENTS IN CASE NO. 09-1158

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QUESTION PRESENTED

Whether Medicaid recipients and providers who face injury from a state statute that conflicts with 42 U.S.C. §1396a(a)(30)(A) may maintain a cause of action for injunctive relief under the Supremacy Clause to prohibit state officials from implementing the preempted state statute.

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INTRODUCTION

The California Legislature adopted a statute that would reduce the State's contribution to the rates used by the State's Medicaid program in paying for in-home supportive services. In the *Dominguez* case, a group of Medicaid beneficiaries and providers who faced imminent injury sought injunctive relief against this statute. The District Court entered a prospective injunction to prevent California officials from implementing the new statute on the ground that the statute conflicts with 42 U.S.C. §1396a(a)(30)(A) ("30(A)") and therefore is preempted under the Supremacy Clause. In this regard, the *Dominguez* case is structurally indistinguishable from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Foster v. Love*, 522 U.S. 67 (1997), and countless other cases since the founding, in which the federal courts granted prospective injunctive relief to prevent state officials from implementing state laws that are preempted under the Supremacy Clause and would cause injury to plaintiffs with Article III standing.

California devotes much of its Brief to defending the premise that there is no such thing as a "cause of action" for injunctive relief that arises directly under the Supremacy Clause. Based on that premise, California argues that the *Dominguez* plaintiffs' plea for injunctive relief should not have been heard, because the pertinent federal statute does not give them a "right" enforceable through 42 U.S.C. §1983 ("§1983") under the *Gonzaga University v. Doe*, 536 U.S. 273 (2002) analysis, or an implied statutory cause of action under the *Cort v. Ash*, 422 U.S. 66 (1975) analysis. Pet. Br. 14-15, 20-23. But accepting California's premise would require elimination of a *constitutional* cause of action available in the federal courts since the inception of the Republic.

Even California ultimately acknowledges that this Court has authorized injunctive relief in numerous actions arising directly under the Supremacy Clause. Pet. Br. 43-44. And this Court's Supremacy Clause cases, which include actions like this one, are firmly rooted in the traditional equitable authority of the federal courts and are necessary to secure the constitutional balance of powers between the federal and state governments. The Constitution and Congress have vested the federal courts with equity jurisdiction, and the courts have a duty to exercise that jurisdiction to enjoin preempted state laws.

STATEMENT OF THE CASE

The *Dominguez* Respondents were the plaintiffs in one of the three cases covered by the Petition in No. 09-1158. The facts and procedural history in California's Statement of the Case are correct as they relate to the *Dominguez* case, with a few exceptions, set forth in the accompanying footnote.[1] Additionally: California does not explain that, after the District Court's preliminary injunction, the California Legislature delayed the effective date of the statute challenged in *Dominguez* until the later of July 1,

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[1] First, California asserts that among the purposes of the challenged statutes was "increasing the efficiency of the State's Medicaid program." Pet. Br. 5. But it was not disputed below that the sole purpose of the statute challenged in *Dominguez* was to address the State's budget deficit. 2009 Cal. Leg. Serv. 3rd Ex. Sess. Ch. 13 (S.B. 6), §13. Second, Respondents disagree that the statute reducing the State's maximum contribution to provider payments left the methodology for determining payments unchanged. Pet. Br. 9. Third, the Court of Appeals panel that issued the decisions in Cases 09-1158 and 09-958 was comprised of two of the same judges as the *Independent Living Center of Southern California v. Shewry*, 543 F.3d 1050 (9th Cir. 2008) (*Independent Living I*) panel but the third judge was not the same. Pet. Br. 14 n.5. Finally, California includes argument within its Statement of the Case that the *Dominguez* Respondents address in the body of this brief. *E.g.*, Pet. Br. 5-6.

2012 or the date that a court renders a final judgment upholding its validity. *See* Cal. Welf. & Inst. Code §12306.1(d)(7)(B).

SUMMARY OF ARGUMENT

1. The *Dominguez* plaintiffs faced injury from the implementation of a state statute that conflicts with 42 U.S.C. §1396a(a)(30)(A) and therefore is invalid under the Supremacy Clause. They obtained a prospective injunction to prevent implementation of the preempted state law. As such, their suit is structurally indistinguishable from *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), *Foster v. Love*, 522 U.S. 67 (1997), and countless cases decided by the federal courts since the founding. These cases arise under the Supremacy Clause and are grounded in the traditional equitable powers of the federal courts.

As amicus United States recognizes, the availability of federal court suits for prospective injunctive relief against state statutes preempted by federal law under the Supremacy Clause is "well established" and "serves an important purpose" by "appropriately vindicat[ing] the supremacy of federal law." U.S. Br. 20-21 & n.7. This Court recognized the viability of such suits in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), reaffirmed their viability in *Shaw*, 463 U.S. at 96 n.14, and has decided on the merits at least 61 such cases, including many in just the past few terms. *See* Appendix (listing cases). As Justice Kennedy explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting).

These suits fall within a broader category of cases authorized by the courts' traditional authority to grant

equitable relief – as opposed to damages – to enforce the Constitution. The Supremacy Clause must be read in light of the founding-era understanding that courts with equity jurisdiction could provide individuals equitable relief for injuries caused by public officials acting in excess of their legal authority.

2. State laws that conflict with the Medicaid Act are preempted under the Supremacy Clause and therefore may be enjoined by the federal courts. While the Court has used a contract analogy as an interpretative aid in some Spending Clause cases, it has always recognized that statutes adopted under Congress' spending powers are "Laws of the United States" for purposes of the Supremacy Clause. U.S. Const., Art VI, cl. 2. Consequently, the Court repeatedly has struck down state laws preempted by Spending Clause statutes.

The Court long ago rejected California's argument that the Supremacy Clause is inapplicable when state participation in a Spending Clause program is voluntary. The Court also long ago rejected California's argument that the presence of a withholding-of-funds remedy as part of Spending Clause programs established by the Social Security Act (which include Medicaid programs) demonstrates that Congress intended to strip the courts of their traditional jurisdiction to enjoin implementation of state laws that are preempted under the Supremacy Clause. The Court found "not the slightest indication" of congressional intent to do so. *Rosado v. Wyman*, 397 U.S. 397, 420, 422 (1970). Congress has ratified that interpretation of the pertinent statutes. And amicus United States pointedly "is *not* suggesting that Congress has displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*." U.S. Br. 32 n.12 (emphasis added; internal quotations and citations omitted).

3. Precedents regarding whether statutes create individual "rights" enforceable under 42 U.S.C. §1983 are not relevant to suits for prospective injunctive relief under the Supremacy Clause. Those §1983 cases deal with an issue of statutory interpretation and a statute that provides for compensatory and punitive damages. The Court's precedents make clear that the unavailability of a claim under §1983 does not mean that the federal courts cannot grant injunctive relief to enforce the Constitution.

Likewise, jurisprudence regarding implied statutory rights of action does not govern this case. Those cases are about congressional intent to authorize a statutory cause of action, which generally would allow damages suits against private defendants for private actions. Such claims are entirely divorced from claims for equitable relief directly under the Supremacy Clause to prevent implementation by public officials of preempted state laws.

4. California proposes that the Court limit the availability of Supremacy Clause injunction actions to situations in which the plaintiff effectively asserts an "anticipatory defense" to a state regulatory action. But that proposed limitation on the authority of the federal courts is not supported by history or precedent.

The historical practice at the founding did not limit equitable relief to plaintiffs seeking to enjoin actions at law or to situations in which an enforcement action could be brought against the plaintiff. And, as a matter of precedent, this Court has authorized Supremacy Clause preemption injunctions where the plaintiff faced no threat of enforcement or regulatory proceedings. *See, e.g.*, *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000); *Foster v. Love*, 522 U.S. 67, 68-69, 74 (1997); *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 283-84 & nn.1-2

(1986). Moreover, the availability of private litigation to vindicate the supremacy of federal law is *more* important when no state enforcement action could be brought.

The United States posits that cases like *Crosby* are permissible Supremacy Clause suits only because they involve, "in effect, [plaintiffs] asserting an immunity" from what were, "in essence, state regulatory requirements" directed at their "primary conduct." U.S. Br. 22-24 & nn.8-9. But that theory finds no support in this Court's cases, lacks any theoretical or historical basis, and fails to explain cases like *Foster*, 522 U.S. at 68-69, 74 (state primary law preempted by federal statute setting date for elections), as well as numerous other decisions in which this Court has decided preemption injunction claims involving disputes over government benefits, in which no such "in essence" regulation argument could be made.

The sum of the matter is that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). That interest is as present in Supremacy Clause injunction actions like this one as in the actions California would allow.

5. Finally, California waived its prudential standing argument by not challenging the *Dominguez* plaintiffs' prudential standing below or raising the issue in its certiorari petition. In any event, the argument is meritless, because the *Dominguez* plaintiffs are Medicaid providers and beneficiaries who are injured by the Supremacy Clause violation at issue and easily meet the prudential standing test.

ARGUMENT

I. A PLAINTIFF INJURED BY A STATE LAW PREEMPTED UNDER THE SUPREMACY CLAUSE MAY OBTAIN A FEDERAL COURT INJUNCTION TO PROHIBIT IMPLEMENTATION OF THE LAW

A. The federal courts have always been open to suits by private litigants seeking to enjoin the implementation of unconstitutional state laws, including laws preempted under the Supremacy Clause, so long as jurisdiction is present

Actions seeking prospective injunctive relief to enforce the Supremacy Clause are not a new phenomenon. As the United States as amicus recognizes, the availability of suits for injunctive relief against state laws preempted by federal law under the Supremacy Clause is "well established," "serves an important purpose" by "appropriately vindicat[ing] the supremacy of federal law," and is rooted in the federal courts' traditional equitable powers to grant injunctive relief. U.S. Br. 20-21 & n.7.

This Court held in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), that "[i]t was proper" for a federal court to issue an injunction prohibiting a state official from implementing a state law (in that case a tax) that was "repugnant to a law of the United States, made in pursuance of the constitution," (there the statute creating the Bank of the United States), explaining that the case was properly "cognizable in a Court of equity." *Id.* at 839, 859, 865, 867-68. In *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 719, 721-24 (1865), the Court decided on the merits a suit to enjoin a state law authorizing construction of a bridge allegedly "repugnant to the Constitution and laws of the United States," including a federal statute that "authorize[d] vessels enrolled and licensed according to its provisions to engage in the

coasting trade." *Id.* at 724. The Court rejected the argument that only the federal government could bring the suit, explaining that "wherever a public nuisance is productive of a specific injury to an individual, . . . if the injury would be irreparable, . . . a court of equity will interpose by injunction." *Id.* at 722 (citing *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (*Wheeling Bridge II*)).[2]

This Court reaffirmed the federal courts' authority to hear such cases in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), explaining that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. §1331 to resolve." *Id.* at 96 n.14.

Though *Shaw* spoke in terms of "jurisdiction" without expressly referring to the plaintiffs' "cause of action," the Court's resolution of the case went beyond a recognition of subject matter jurisdiction. Unlike in *Bell v. Hood*, 327 U.S. 678, 681-85 (1946), the Court in *Shaw* did not simply conclude that the district court had jurisdiction, but rather it went on to resolve the case on the merits and strike down the preempted state law. The Court noted that it "frequently has resolved pre-emption disputes in a similar jurisdictional posture." 463 U.S. at 96 n.14 (citing cases).

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[2] Congress conferred general federal question jurisdiction on the federal courts in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. Earlier, jurisdiction was generally limited to cases in diversity, with some narrow exceptions. *See* Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73. During that time, injunction actions to enforce the Supremacy Clause were available where the federal courts had jurisdiction over the case. *See, e.g.*, *Osborn*, 22 U.S at 817-18 (jurisdiction conferred by statute incorporating Bank of the United States); *Gilman*, 70 U.S. at 719, 721 (diversity).

Thus, as Justice Kennedy correctly explained in *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989), "plaintiffs may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes." *Id.* at 119 (Kennedy, J., dissenting). This Court also pointed out in *Lawrence County v. Lead-Deadwood School District*, 469 U.S. 256 (1985), that a claim that a state law is preempted by a federal statute adopted under Congress' Spending Clause authority states a federal claim under the same rationale applied in *Shaw*. 469 U.S. at 259 n.6.

The cases listed in the accompanying Appendix reflect that this Court has decided at least 61 cases brought in federal court directly under the Supremacy Clause for injunctive or declaratory relief against preempted state laws, including several in just the past few terms. *See, e.g., Chamber of Commerce of the U.S. v. Whiting*, 131 S.Ct. 1968, 1977, 1987 (2011) (reaching merits in injunctive suit by business and civil rights groups alleging state law preempted by federal immigration law); *Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 64-66 (2008) (holding state statute preempted by National Labor Relations Act); *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 369 (2008) (holding state statute preempted by Federal Aviation Administration Authorization Act).[3] Countless such cases have been heard by the lower federal courts without reaching this

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[3] Based on our review, the preemption claims in the cases listed in the Appendix were not brought under 42 U.S.C. §1983; nor does it appear that the federal statutes involved contain the type of "rights-creating" language necessary to satisfy the test set forth in *Gonzaga University v. Doe*, 536 U.S. 273 (2002). *See infra* at 38-39. The Appendix does not contain numerous additional cases decided by this Court in which Supremacy Clause injunction claims were initially brought in state court. *See infra* at 10.

Court. This Court has also decided on the merits numerous federal Supremacy Clause injunction claims brought initially in the state courts. *See, e.g., Mid-Con Freight Sys., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 440, 442, 445 (2005); *Castle v. Hayes Freight Lines*, 348 U.S. 61, 62-63 (1954); *Coyle v. Smith*, 221 U.S. 559, 562-65 (1911); *Boyer v. Boyer*, 113 U.S. 689, 690-91 (1885).

These actions fall within a broader category of cases granting equitable relief, which "has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S.Ct. 3138, 3151 n.2 (2010) (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

While this Court has been reluctant to recognize new causes of action to seek *damages* for constitutional violations, it has repeatedly stressed the important distinction between damages and injunctive relief, reaffirming the traditional availability of the latter in suits to enforce the Constitution. *See, e.g., United States v. Stanley*, 483 U.S. 669, 683 (1987) (claims for injunctive relief, unlike claims for money damages, are "designed to halt or prevent the constitutional violation . . . [, seek] traditional forms of relief, and '[do] not ask the Court to imply a new cause of action.'") (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 n.2 (1983)); *Malesko*, 534 U.S. at 74; *cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (recognizing "presumed availability of federal equitable relief against threatened invasions of constitutional interests"). The distinction between suits for damages and those seeking equitable relief reflects the historical grounding of the latter in the federal courts' traditional equitable powers. *See Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) ("Prevention of impending injury by unlawful action is a well-recognized function of courts of equity").

Thus, injured individuals have since the founding been able to seek prohibitory injunctions against state officials in the federal courts to prevent implementation of unconstitutional laws, so long as the case otherwise fell within the federal courts' jurisdiction. *See, e.g., Osborn*, 22 U.S. at 868, 870 (state act "repugnant" to law constituting Bank of the United States was "unconstitutional and void"); *Dodge v. Woolsey*, 59 U.S. 331, 336, 339, 360-61 (1855) (state law violated contracts clause); *Ex parte Young*, 209 U.S. 123, 144 (1908) (state law violated due process); *Pierce*, 268 U.S. at 534-36 (state law contrary to Fourteenth Amendment liberty interests).

B. Injunction actions to enforce the Supremacy Clause are supported by the founding era understanding that courts with equitable jurisdiction would have authority to prevent injury caused by constitutional violations

Not only are injunctions to enforce the Supremacy Clause not a new phenomenon, but they are firmly grounded in the founding generation's understanding of equity jurisdiction. California's ahistorical approach ignores the background against which the Supremacy Clause and the other provisions of the Constitution were adopted.[4]

The framers drafted the Constitution, and the founding generation ratified it, within an existing jurisprudential framework that defined judicial authority and determined which cases courts would properly entertain. Operating within this framework, the framers and ratifiers would

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[4] Likewise, amicus National Governors Association offers an account of the colonial practice of appeals to the Privy Council in England, but says nothing about types of cases the founding generation would have understood to be cognizable in courts of equity. Nat'l Govs. Ass'n Br. 4-13.

have expected that a court with equitable jurisdiction could provide injured individuals relief for injuries caused by constitutional violations, without requiring that the plaintiff point to a statute creating a specific "cause of action." Whatever the Court's modern jurisprudence may say about the viability of suits seeking redress for purely statutory violations, the availability of suits to enforce the *Constitution* through equitable relief stems from this founding era understanding of the authority of courts of equity.

1. While common law courts in the eighteenth century would hear cases only where the plaintiff's injuries conformed to a recognized form of action, F.W. Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* 296-300 (1929 ed.), equity courts ("chancery courts") could hear cases and provide relief for injuries that did not conform to the set common law forms. John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* 7-9 (2d ed. 1787) ("Mitford").[5] To be entitled to equitable relief, plaintiffs had to show "that the acts complained of are contrary to equity, and tend to the *injury* of the complainants, and that they have no remedy, or not a complete remedy, without the assistance of the court." *Id.* at 43 (emphasis added).

In accord with this basic rule, at the time of the founding, suits in equity against public officials were available to prevent injury caused by actions taken in excess of the officials' legally conferred authority. *See, e.g., Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (suit in English High Court of Chancery against turnpike com-

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[5] "Prior to the Revolution, courts of chancery had existed in some shape or other in every one of the thirteen colonies." Solon Dyke Wilson, *Courts of Chancery in the American Colonies*, in 2 *Select Essays in Anglo-American Legal History* 779, 779 (1907).

missioners).[6] Cases from both America and England decided after the founding confirm the settled principle that "relief may be given in a court of equity . . . to prevent an injurious act by a public officer, for which the law might give no adequate redress." *Carroll v. Sanford*, 44 U.S. (3 How.) 441, 463 (1845); *see, e.g.*, *Belknap v. Belknap*, 2 Johns. Ch. Rep. 463, 473 (N.Y. Ch. 1817) (based on "well settled" "jurisdiction of chancery," if commissioners "exceeded their powers, . . . chancery would restrain them by injunction, and keep them strictly within the limits of their power") (citing cases); *Baring v. Erdman*, 2 F. Cas. 784, 786 (No. 981) (C.C.E.D.Pa. 1834) (where acts of public officials "transcend the authority conferred on them by law," they are subject to control by injunction to prevent "irreparable injury"); *Frewin v. Lewis*, 4 Mylne & Craig 249, 254-55 (Ch. 1838) (equity court will prevent injury by enjoining public officials from acting "beyond the line of their authority"). Applying this principle, the founding generation understood that suits would be available in courts with equity jurisdiction to enjoin public officials from exceeding the limits on their authority set in the Constitution. The Supremacy Clause is, of course, one such limit.

2. It would be contrary to the understanding at the founding to limit suits to enforce the Constitution to circumstances in which a statute provides the plaintiff a "right" as that term is used in the context of this Court's modern 42 U.S.C. §1983 and implied-statutory-right-of-

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[6] The authority of courts of equity to enjoin public officials from causing injury has ancient roots. *See, e.g.*, *Hall v. Mason*, Callis, 262 (1621) (suit in equity against Commissioners of Sewers), discussed in *The Reading of the Famous and Learned Robert Callis, Esq. Upon the Statute of Sewers* 262 (4th ed. 1824); *Box v. Allen*, 1 Dickens 49 (Ch. 1727) (Commissioners of Sewers); *Pilkington v. City of York*, 1 Dickens 84 (Ch. 1742) (city).

action jurisprudence. Indeed, in the founding era a plaintiff in equity did not have to show that a statute provided a "right" even as the term was understood then (i.e., a legal interest recognized by the common law courts), nor did a plaintiff have to show a right to proceed at common law against the defendant. Rather, the founding generation understood the question whether a party could bring suit in equity to redress a particular injury to be a question about the scope of the court's "jurisdiction." *See* Mitford at 103-04 (discussing availability of equitable relief in terms of "jurisdiction"); *id.* at 120-21 (to support bill in equity where plaintiff suffers injury and common law provides no remedy or recognizes no right at all, plaintiff must "sh[o]w that the subject of the suit is such upon which a court of equity will assume jurisdiction").

Equity courts had jurisdiction to exercise power in a variety of contexts, including both "where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose," *and* "where the principles of law by which the ordinary courts are guided *give no right*, but upon the principles of universal justice the inference of the judicial power is necessary to prevent a wrong, and the positive law is silent." Mitford at 103-04 (emphasis added); *see* 1 Joseph Story, *Equity Jurisprudence* §29 (1836) ("Story"); 1 John Norton Pomeroy, *Equity Jurisprudence* §424 (1881) ("Pomeroy"). The question was whether the defendant's unlawful acts unjustly "tend to the *injury* of the complainant." Mitford at 43 (emphasis added). Where a court of equity exercised its authority, it would issue injunctions "to restrain the defendant from . . . doing any injurious act." *Id.* at 46; *see also* 3 Matthew Bacon, *A New Abridgement of the Law* 172 (6th ed. 1743) (defining injunction as "a prohibitory Writ, restraining a Person from committing or

doing a Thing which appears to be against Equity and Conscience") (citing cases).[7]

While the common law courts "viewed an action as a test of a judicial right asserted," the equity courts "viewed a suit from the standpoint of the wrong presented for investigation." Charles D. Frierson, *A Certain Fundamental Difference in Viewpoint Between Law and Equity as Illustrated by Two Maxims*, in *Report of the Proceedings of the Bar Association of Arkansas* 130, 131 (1914-1915). Equity jurisdiction was exercised upon the ground "that a wrong [wa]s done, for which there [wa]s no plain, adequate, and complete remedy in the Courts of Common Law." 1 Story §49. By the time of the founding, this basic guiding equitable principle had long been established. As but one example, in a case decided in 1491, Chancellor Morton, Archbishop of Canterbury, responded to an argument that he was without jurisdiction because upon the facts the common law admitted no right and gave no remedy, by stating: "It is so in all cases where there is no remedy at the common law and no right, and yet a good remedy in equity." Year Book of Henry VII, folio 12 (quoted in 1 Pomeroy §50); *see also* 1 Pomeroy §423.

3. The Constitution authorized the creation of federal courts that would have all the traditional equitable powers by declaring in Article III that the judicial power of the United States extends "to all cases, in Law and Equity." The first Congress then delineated the initial set of cases in

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[7] Plaintiffs whose claims sounded in equity may have lost *on the merits* if they did not have an "[i]nterest in the subject of the suit," for example "where a plaintiff claimed under a will, and it was apparent upon the construction of the will that he had no title," Mitford at 136 (citing *Brownsword v. Edwards*, 2 Vesey 243, 247 (Ch. 1750)), or if they did not have "proper title to institute a suit concerning" the subject matter, for example where an executor had not properly proved the validity of the will of his testator. Mitford at 137-38 (citing cases).

which the federal courts could exercise their equitable authority by granting the courts diversity jurisdiction over suits "in equity" in the Judiciary Act of 1789, ch. 20, §11, 1 Stat. 73, 78. In doing so, the founding Congress intended the federal courts to apply the principles and provide the remedies available in the High Court of Chancery in England. *See Robinson v. Campbell*, 16 U.S. (3 Wheat) 212, 222-23 (1818); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832); *see also* 1 Story §57. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851) (*Wheeling Bridge I*), the Court summarized the rule, which had been observed in the federal courts "since the organization of the government," that in equity suits "[t]he usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings," and "there is no other limitation to the exercise of a chancery jurisdiction by these courts," except limitations in statutes defining federal court jurisdiction generally. *Id.* at 563.

Early practices of both federal and state courts reflect that traditional equitable principles authorized suits by individuals threatened with injury for equitable relief against the operation of unconstitutional state laws, where no adequate remedy was available at law. *See, e.g, Osborn*, 22 U.S. at 845 (holding case to be one "in which a Court of equity ought to interpose"); *State v. Wilson*, 11 U.S. (7 Cranch) 164, 166, 166-67 (1812) (state court suit to prevent operation of state law in conflict with federal constitution); *cf. Weston v. City Council of Charleston*, 27 U.S. 449, 450 (1829) (state court prohibition action); *Lindsay v. East Bay Street Comm'rs*, 2 Bay 38 (S.C.Const. 1796) (same).[8]

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[8] State courts' early practice of entertaining injunctive suits to prevent implementation of state laws under state constitutions reflects the same basic understanding of traditional equitable principles. *See, e.g., Turpin v. Locket*, 10 Va. (6 Call) 113 (1804); *Bradley v. Commissioners*, 21 Tenn. 428 (1841); *Galloway v. Jenkins*, 63 N.C. 147 (1869); *Graham v. Horton*, 6 Kan. 343 (1870).

Suits to enforce the Constitution through equitable relief proliferated after Congress granted general federal question jurisdiction to the federal courts in all cases "in equity" in the Judiciary Act of 1875, ch. 137, §1, 18 Stat. 470. *See, e.g., Greenwood v. Union Freight R. Co.*, 105 U.S. 13, 14, 16-17 (1881); *Poindexter v. Greenhow*, 114 U.S. 270, 275 (1885); *Allen v. Baltimore & O.R. Co.*, 114 U.S. 311, 311-13 (1885); *Pennoyer v. McConnaughy*, 140 U.S. 1, 8, 25 (1891); *Ex parte Tyler*, 149 U. S. 164, 187-88 (1893); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 393, 399 (1894); *Scott v. Donald*, 165 U.S. 107, 108-09, 112 (1897); *Smyth v. Ames*, 169 U.S. 466, 469-70, 476-77, 517, 522-23 (1898); *see also Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing numerous cases where "state officers seeking to enforce unconstitutional enactments" were subject to "injunction process" to prevent "injury threatened by [officers'] illegal action"). This Court reaffirmed the viability of such suits in *Ex parte Young*, 209 U.S. 123, 149, 167 (1908).

C. Injunction actions to enforce the Supremacy Clause have correctly been treated the same as suits seeking to enforce other constitutional provisions

This Court has never distinguished the availability of suits seeking injunctive relief to enforce the Supremacy Clause from suits seeking such relief to enforce other provisions of the Constitution. Nor is there a reasoned basis for such a distinction.

The Supremacy Clause declares that both "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI, cl.2. In their relation to state laws, the Supremacy Clause places the Constitution and laws of the United States on equal footing. There is no structural or textual reason to distinguish between them for

purposes of injunctive suits to prevent implementation of invalid state laws. A state official violates the federal Constitution when he enforces a state statute that conflicts with either source of supreme law.

Moreover, contrary to California's contention (Pet. Br. 35-36), a suit to enforce the Supremacy Clause *is* a suit that arises directly under the Constitution. *See Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 272 (1977) (preemption "claim is basically constitutional in nature, deriving its force from the operation of the Supremacy Clause"). A state law "cannot be constitutional" if "it conflicts with a law of congress made in pursuance of the constitution, and which makes it the supreme law of the land." *Dobbins v. Commissioners of Erie County*, 41 U.S. 435, 450 (1842), *overruled on other grounds by Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 481-82, 486 (1939); *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (holding that "the unavoidable consequence of that supremacy which the constitution has declared" is that state laws that act "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress" are "unconstitutional and void"); *Osborn*, 22 U.S. at 868, 870 (state law "repugnant to a law of the United States" is "unconstitutional and void").[9]

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[9] *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), is not to the contrary. The Court there dealt with a pure issue of statutory interpretation, *i.e.*, whether Congress meant the jurisdiction of three-judge district courts, which was limited to situations where a state statute was challenged "'upon the ground of the unconstitutionality of such statute,'" to cover suits to enjoin enforcement of state laws based on alleged conflict with a federal statute. *Id.* at 114 (quoting 28 U.S.C. §2281). The Court recognized that such suits do seek relief on "constitutional grounds," because "any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution." *Id.* at 125. Nonetheless, while

(*continued* . . .)

California suggests that other provisions of the Constitution involve individual "rights," but this Court has decided on the merits many actions for prospective injunctive relief to enforce *structural* provisions of the Constitution. *See, e.g., Free Enterprise Fund*, 130 S.Ct. at 3151 n.2 (rejecting argument that "Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583, 589 (1952) (steel mill seizures exceeded President's constitutional powers); *Hill v. Wallace*, 259 U.S. 44, 67-68, 70 (1922) (federal statutory provision unenforceable because exceeded Congress' enumerated powers); *cf. Dennis v. Higgins*, 498 U.S. 439, 458 (Kennedy, J., dissenting) (like Contracts Clause, even if Commerce Clause secures no "rights" in the §1983 sense, "courts provide a person injured by taxation that exceeds the limits of the Commerce Clause the 'right to have a judicial determination, declaring the nullity of the attempt to' levy a discriminatory tax") (quoting *Carter v. Greenhow*, 114 U.S. 317, 322 (1885)).

That being so, there is no reason to distinguish suits for injunctive relief under the Supremacy Clause. As this Court has explained, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury . . . ." *Bond v. United States*, 131 S.Ct. 2355, 2364 (2011). Individual equitable suits to enforce the Supremacy Clause effectuate "[t]he Framers['] conclu[sion] that allocation of powers between the National Government and the States

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(. . . *continued*)
acknowledging that its reading of the statute was not "compelled" by its text, the Court chose to narrowly construe the jurisdiction of three-judge courts because of the particular concerns of the legislators who enacted the jurisdictional statute and "important considerations of judicial administration." *Id.* at 126-29.

enhances freedom . . . [b]y denying any one government complete jurisdiction over all the concerns of public life." *Id.* at 2364. "In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

California does not show otherwise by pointing out that the framers intended the Supremacy Clause to be a "rule of decision" governing how to resolve conflicts between federal and state law when they arose. Pet. Br. 17-18, 35-36. Almost every provision of the Constitution acts as a "rule of decision" when cases implicating it arise. More to the point, the framers understood that a court with equity jurisdiction would have the power to decide suits seeking to "set aside" and "declare . . . void" unconstitutional state laws in order to ensure the supremacy of national law. 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 27 (1911 ed.) (Madison); *id.* at 28 (Morris); *id.* at 391 (Wilson); *see supra* at 11-16.

II. STATE LAWS THAT CONFLICT WITH THE MEDICAID ACT ARE PREEMPTED UNDER THE SUPREMACY CLAUSE AND MAY BE ENJOINED BY THE FEDERAL COURTS

The above discussion about the equitable authority of the federal courts applies with equal force to all claims brought directly under the Supremacy Clause to enjoin state laws that are inconsistent with federal statutes. Yet California contends that federal statutes adopted under the Spending Clause are different. According to California, "the Supremacy Clause and preemption have no role in a dispute over a state's compliance with a funding condition set forth in a Spending Clause statute," such as the Medicaid Act. Pet. Br. 18, 46-49. These contentions are meritless.

1. California initially submits that the Supremacy Clause never comes into play when Congress legislates pursuant to its spending powers because "[t]he relationship between the federal and state governments in this context is defined *not* by the supremacy of federal law, but by the quasi-contractual agreement between the governments." Pet Br. 18 (emphasis in original), 46-47. But statutes adopted under the spending power carry the same force and authority as statutes enacted under other enumerated powers. This Court, therefore, has used the contract analogy only as an interpretive aid, while "be[ing] careful not to imply that all contract-law rules apply to Spending Clause legislation." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (italics omitted); *see also Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 669 (1985) ("[T]he program cannot be viewed in the same manner as a bilateral contract governing a discrete transaction.").

For purposes of the Supremacy Clause, the Court has never distinguished between laws enacted pursuant to Congress' spending powers and other federal laws, and instead has in numerous decisions held state laws or regulations invalid under the Supremacy Clause because they are inconsistent "with a funding condition set forth in a Spending Clause statute." Pet. Br. 18.[10]

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[10] *See, e.g.*, *King v. Smith*, 392 U.S. 309, 333 n.34 (1968) ("There is of course no question that the Federal Government . . . may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."); *Townsend v. Swank*, 404 U.S. 282, 285 (1971) ("We hold that the Illinois statute and regulation conflict with [the Social Security Act] and for that reason are invalid under the Supremacy Clause."); *id.* at 286 ("[A] state eligibility standard that excludes persons eligible for assistance . . . under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."); *California Dep't of Human Res. Dev. v. Java*, (*continued* . . .)

California ignores these precedents, asserting that the Supremacy Clause applies only to "Congress' exercise of power particularly with respect to commerce and treaties – areas in which Congress may exercise exclusive regulatory (i.e. preempting authority)" and that allowing California to defy federal Spending Clause statutes "does not frustrate the national purposes for which the Union was formed." Pet. App. 48-49 & n.18. To the contrary, the Supremacy Clause applies to *all* "Laws of the United States." U.S. Const., Art. VI, cl. 2. Among the "Laws of the United States" are those laws adopted by Congress pursuant to its powers to tax and spend to further the "general Welfare" (U.S. Const., Art. I, §8, cl. 1), which, contrary to California's assertion (Pet. Br. 49 n.18), are

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(. . . *continued*)
402 U.S. 121, 135 (1971) ("[E]nforcement of [the California statute] must be enjoined because it is inconsistent with . . . the Social Security Act."); *Carleson v. Remillard*, 406 U.S. 598, 601 (1972) ("If California's definition conflicts with the federal criterion [under the Social Security Act] then it . . . is invalid under the Supremacy Clause."); *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 417 (1973) (state law preempted by Social Security Act "by reason of the Supremacy Clause"); *Shea v. Vialpando*, 416 U.S. 251, 266 (1974) (affirming injunction against Colorado welfare regulation that conflicts with Social Security Act); *Philbrook v. Glodgett*, 421 U.S. 707, 719 (1975) (same as to Vermont welfare regulation); *Youakim v. Miller*, 425 U.S. 231, 233 (1976) (per curiam) (remanding for determination of "Supremacy Clause claim" alleging Illinois' regulation was inconsistent with Social Security Act); *Miller v. Youakim*, 440 U.S. 125, 132 (1979) (state law "is inconsistent with the Social Security Act and therefore invalid under the Supremacy Clause"); *Blum v. Bacon*, 457 U.S. 132, 145-46 (1982) ("Because New York's no-cash and loss-or-theft rules conflict with a valid federal regulation [adopted under the Social Security Act], they are invalid under the Supremacy Clause."); *Bennett v. Arkansas*, 485 U.S. 395, 397 (1988) (inconsistency between state law and Social Security Act "amounts to a 'conflict' under the Supremacy Clause — a conflict that the State cannot win"); *Arkansas Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 292 (2006) (state lien on tort settlements inconsistent with Medicaid Act and therefore invalid).

among the "enumerated powers under the Constitution," no less than the power to "regulate Commerce." U.S. Const., Art. I, §8, cl. 3; *see South Dakota v. Dole*, 483 U. S. 203, 206-207 (1987).

Ongoing state defiance of any valid federal law, moreover, does "frustrate the national purposes for which the Union was formed," regardless of which provision(s) of the Constitution authorized Congress to adopt that law. As the Court explained in *Green v. Mansour*, 474 U.S. 64 (1985) – a Spending Clause case – "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." 474 U.S. at 68.

The Court also recognized in *Lawrence County*, 469 U.S. at 259 n.6, that a claim that a state law is preempted by a federal statute adopted under Congress' Spending Clause authority states a federal claim under the same rationale applied in *Shaw*. *Lawrence County* held that a state law regulating the distribution of funds that local government units receive from the federal government was preempted by the Payment in Lieu of Taxes Act, 31 U.S.C. §6901 *et seq.*, which granted localities the authority to make their own decisions about the use of federal funds. The Eighth Circuit had vacated a judgment for the plaintiff county in its federal court preemption injunction action based on the court's determination that the plaintiff did not "affirmatively assert[] a federal claim." *Lawrence County v. South Dakota*, 668 F.2d 27, 30-31 (8th Cir. 1982). Relying on *Shaw*, this Court recognized that "[t]his ruling was erroneous." *Lawrence County*, 469 U.S. at 259 n.6. The Supremacy Clause claim here is indistinguishable from the federal court claim in *Lawrence County*.

2. California next contends – again without acknowledging 40 years of contrary precedent (*see supra* n.10) – that "the Supremacy Clause cannot be used to 'invalidate' or declare 'null and void'" a state law preempted by the Medicaid Act, because state participation in the Medicaid program is *voluntary*. Pet. Br. 47-48. But it does not follow from California's freedom to refrain from participating in Medicaid that the courts cannot enjoin its officials from implementing a state law contrary to the Medicaid Act while the State does participate in that program.

For example, the Civil Rights Act of 1964 requires the owner of any "inn, hotel, motel or other establishment which provides lodging to transient guests" to offer lodging to all on non-discriminatory grounds. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 247 (1964). It does not require anyone to open a hotel or forbid anyone from exiting the hotel business. Yet a prospective injunction would be an appropriate remedy to prevent the continuing violation of federal law by a defendant who is operating a hotel. *See id.* at 242, 244-45.

The Court recognized in *King v. Smith* – a Spending Clause case – that "States are not required to participate in the [federal] program" (392 U.S. at 316), but held an Alabama "regulation . . . invalid because it defines 'parent' in a manner that is inconsistent with . . . the Social Security Act." *Id.* at 333; *see also Guardians Ass'n v. Civil Serv. Comm'n of N.Y.C.*, 463 U.S. 582, 596 (1983) (plurality opinion) ("[A] court may identify the violation and enjoin its continuance . . . [;] the recipient has the option of withdrawing and hence terminating the prospective force of the injunction."); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989) (recognizing that the State in Spending Clause preemption cases could "relieve itself of federal obligations by declining federal funds").

3. This Court also long ago rejected California's argument (Pet. Br. 47-48) that Congress' authorization of a withholding-of-federal-funds administrative remedy as part of Spending Clause programs established by the Social Security Act (which include the Medicaid program) demonstrates that Congress intended to strip the courts of their "traditional jurisdiction" to enjoin enforcement of state laws that are invalid under the Supremacy Clause. *See Rosado v. Wyman*, 397 U.S. 397, 420 (1970) ("We adhere to *King v. Smith*, 392 U.S. 309 (1968), which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial relief.").

Even if Congress *could* have established the Medicaid program differently, it did not do so. This Court interpreted the pertinent statutes many decades ago and found "*not the slightest indication* that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field." *Rosado*, 397 U.S. at 422 (emphasis added). The United States agrees. U.S. Br. 32 n.12 ("The United States is *not* suggesting that Congress has 'displayed an intent not to provide the more complete and more immediate relief that would otherwise be available under *Ex parte Young*.'") (quoting *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 647 (2002)) (emphasis added; further internal quotations and citations omitted).

Congress' adoption of the so-called "*Suter*-fix" amendments to the Medicaid Act in 1994 ratified the interpretation of the statute that California now asks the Court to reject. The 1994 amendments were adopted after this Court's decision in *Suter v. Artist M.*, 503 U.S. 347 (1992), which held that a provision of the Medicaid Act did not secure individual "rights" within the meaning of §1983 because, among other things, the provision concerned the

contents of a state plan. Congress responded by amending the Medicaid Act to provide, in pertinent part, that "[i]n an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan." 42 U.S.C. §1320a-2; *see also id.* §1320a-10 (same language). This amendment cannot be reconciled with California's proposed interpretation of the Medicaid Act, under which the statutory requirements for a state plan are simply judicially unenforceable administrative provisions to guide continued funding decisions.

Congress also has amended the Medicaid Act many times after *Rosado* without changing the statutory structure to make the administrative remedy exclusive. *Cf. Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983) (in light of "well-established judicial interpretation" permitting suits under §10(b) of Securities Exchange Act of 1934 "regardless of the availability of express remedies," Congress' decision when amending the securities laws in 1975 "to leave Section 10(b) intact suggests that Congress ratified the cumulative nature of the Section 10(b) action").[11]

In light of the particular judicial history of the Social Security Act, even if the Court wished to give notice that it would henceforth view the existence of a withholding-of-funds remedy in new Spending Clause statutes as indicative of an intent to withdraw the traditional author-

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[11] Contrary to California's contention (Pet. Br. 31-33), Congress' 1997 amendment repealing the Medicaid Act provision at issue in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) – the Boren amendment – has no bearing on this case. Congress' repeal of the Boren Amendment meant that participating states were no longer required to comply with that provision. Congress therefore did not address the availability of private litigation to enforce the Boren Amendment, much less as a general matter.

ity of the federal courts to entertain Supremacy Clause injunction actions, it would betray Congress' reliance on prior Court decisions to apply such a rule here. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 717-18 (1979) (Rehnquist, J., concurring) (explaining that while Congress was now on notice that Court would be reluctant in future to imply statutory causes of action, Court would not apply that rule retroactively because "we do not write on an entirely clean slate," and Congress had relied on prior interpretations of law).

4. Finally, there is no tension between the Court's reasoning in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and injunctions under the Supremacy Clause to prohibit enforcement of state laws that are inconsistent with Spending Clause statutes.

Pennhurst held only that obligations imposed upon participating states by federal spending power programs must be imposed "unambiguously" so participating states are "voluntarily and knowingly" undertaking those obligations. *Id.* at 17. This "clear notice" rule governs whether an obligation exists at all. That is, absent "clear notice," a purported obligation in a Spending Clause statute would be neither enforceable administratively by the federal government nor through private lawsuits. *See South Dakota v. Dole*, 483 U.S. 203, 207-209 (1987) (discussing "clear notice" requirement as basic limitation on federal spending power and applying it to case involving federal withholding-of-funds remedy, not private enforcement).

When a participating state does have "clear notice" of an obligation imposed by federal law, however, a prospective injunction to preclude implementation of a state law that conflicts with the federal statute serves only to hold the state to the "deal" that the state "voluntarily and knowingly" accepts. *Cf. Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 534 (2007) ("Our determination that

IDEA grants to parents independent, enforceable rights does not impose any substantive condition or obligation on States they would not otherwise be required by law to observe."); *Bell v. New Jersey*, 461 U.S. 773, 790 n.17 (1983) (Congress need not warn in advance of "the remedies available against a noncomplying California"). While California might prefer that enforcement be limited to the ineffectual threat of withholding of funds by an overburdened federal agency, it does not have a legitimate interest in continuing to implement a preempted law. Moreover, a court ruling that a state law is preempted allows the state the option to withdraw from the federal program if it wishes to avoid the prospective injunction, or to "voluntarily and knowingly" continue its participation. *See supra* at 24.

California seeks to smuggle into this case the issue whether its state statute was in fact in conflict with 42 U.S.C. §1396a(a)(30)(A) by suggesting that §30(A) is too "nebulous" to provide a judicially enforceable standard. But the lower courts disagreed with California, and this Court denied certiorari on the question whether §30(A) preempts the state statute. The Court must therefore take as a given in this case that §30(A) provides sufficiently clear notice to impose an obligation under *Pennhurst*, and that California officials sought to defy federal law by implementing a state statute that is void under the Supremacy Clause.

III. THE COURT'S JURISPRUDENCE REGARDING 42 U.S.C. §1983 CLAIMS AND STATUTORY RIGHTS OF ACTION DOES NOT APPLY TO PROHIBITORY INJUNCTIONS SOUGHT DIRECTLY UNDER THE CONSTITUTION

A. Section 1983 claims and preemption injunction actions to enforce the Supremacy Clause are substantively, historically, and practically distinct

This Court's jurisprudence regarding whether statutes create individual "rights" enforceable under §1983 is simply not relevant to suits for prospective injunctive relief directly under the Supremacy Clause. California acknowledges that this Court has approved of injunctive relief against implementation of state laws preempted by federal statutes without relying on "rights" enforceable under *Gonzaga University v. Doe*, 536 U.S. 273 (2002). Pet. Br. 43-44 & n.15. This Court has consistently recognized that the unavailability of a claim under §1983 does not exclude traditional injunctive relief to enforce the Constitution.[12] That is equally true of suits to enforce the Constitution's Supremacy Clause. *See Golden State*, 493 U.S. at 119 (Kennedy, J., dissenting) (even where §1983

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[12] *Compare Carter v. Greenhow*, 114 U.S. 317, 322-323 (1885) (holding that Contracts Clause did not "secure" rights enforceable through §1983, but noting that Congress "has legislated in aid of the rights secured by that clause of the constitution . . . by conferring jurisdiction upon the [lower federal] courts . . . of all cases arising under the constitution and laws of the United States"), *with White v. Greenhow*, 114 U.S. 307, 308 (1885) (permitting suit to enforce Contracts Clause to proceed under federal jurisdiction statute); *see also Holt v. Indiana Mfg. Co.*, 176 U.S. 68, 72 (1900) (suit could not be brought under §1983, but "[i]f state legislation impairs the obligations of a contract . . . remedies are found in [what is now 28 U.S.C. §1331], giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States").

damages claims are unavailable, plaintiffs "may vindicate . . . pre-emption claims by seeking declaratory and equitable relief in the federal district courts through their powers under federal jurisdictional statutes").

Equitable suits to enjoin allegedly unconstitutional state laws, including suits to enforce the Supremacy Clause, were available long before Congress adopted what is now §1983. *See supra* at 7-8, 16. By enacting the provision that became §1983, Congress provided private litigants previously unavailable remedies, broadened the range of conduct by public officials that could be challenged by injured individuals as violating their federal rights, and expanded the jurisdiction of the federal courts. This Court's recognition of limits on this statutory expansion in *Gonzaga* and its progeny, based on the particular statutory text and purpose of §1983, does not affect the pre-existing authority of the federal courts to hear claims for injunctive relief directly under the Supremacy Clause.[13]

1. Section 1983 expanded the remedies available to private litigants. The sole remedies available for equitable claims under the Supremacy Clause are injunctive and declaratory relief against the operation of the preempted state law. By contrast, §1983 provides for damages, including punitive damages. *See Carlson v. Green*, 446 U.S. 14, 22 (1980).

When it was first adopted in 1871, supporters of the provision that became §1983 confirmed their intent to provide for monetary relief. *See, e.g.*, Cong. Globe, 42d

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[13] California's reliance on *Astra USA, Inc. v. Santa Clara County*, 131 S.Ct. 1342, 1345 (2011) (Pet. Br. 34), is misplaced. *Astra* did not involve either the Supremacy Clause or §1983, and, as discussed in the text, Supremacy Clause injunction actions predate and are distinct from §1983 claims.

Cong., 1st Sess. App. 477 (1871) (statement of Rep. Dawes) (provision meant to protect "every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution" by "giving him a civil remedy in the United States courts for any damage sustained in that regard"); *id.* at App. 446 (statement of Rep. Butler) (pointing to the kinds of rights violations the provision was meant to address by insisting that "[n]o other nation on earth would permit its citizens to be thus tortured and murdered and its officers stricken down defenseless and unavenged," but would demand "reparation" and ensure that "full indemnity is made" by those responsible).

Opponents similarly complained that the provision that became §1983 "'gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a *civil action for damages* against the wrongdoer in the Federal courts,'" and lamented the "'mercenary considerations'" this expansion of remedies was likely to foster. *Monroe v. Pape*, 365 U.S.167, 178 (1961) (quoting Cong. Globe, 42d Cong., 1st Sess. App. 50 (1871) (statement of Rep. Kerr)) (emphasis added); *see also* Cong. Globe, 42d Cong., 1st Sess. App. 365-66 (1871) (statement of Rep. Arthur) (decrying possibility that state officials would be subjected to "heavy damages and amercements"); *id.* at App. 385 (statement of Rep. Lewis) (objecting that provision makes state judges "liable to a suit in the Federal court and *subject to damages*" and "a ministerial officer is subject to the same pains and penalties") (emphasis added).

This Court's §1983 jurisprudence has largely been an explication of the various contexts in which damages and other enhanced remedies (which now include attorney's fees, *see* 42 U.S.C. §1988(b)) are available. *See, e.g.*, *Gonzaga*, 536 U.S. at 276 ("The question presented is

whether a student may sue a private university for [compensatory and punitive] damages" under §1983, to enforce provisions of particular federal statute). In contrast, the issue before this Court now concerns the availability of traditional equitable relief."

2. Section 1983 also provides a cause of action to challenge state violations of federal rights that could not be challenged in a traditional suit to enforce the Supremacy Clause.

The Supremacy Clause provides that federal law is supreme over "any Thing in the Constitution or Laws of any State." U.S. Const., Art. VI, cl. 2. It thus preempts – *i.e.*, nullifies or voids – state and local laws and regulations that conflict with or frustrate the objectives of federal law. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) ("The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress . . . .'") (quoting *Gibbons v.*

" Amicus National Governors Association points out that some members of the Congress that enacted in 1871 the legislation now codified as §1983 believed it provided "new" equitable remedies in federal court. Nat'l Govs. Ass'n Br. 29 (italics omitted). Section 1983 did provide for *some* equitable remedies not previously available in federal court, both by expanding the kinds of state action that could be challenged by private litigants, *see infra* at 33, and by providing that suits pursuant to its provisions were "to be prosecuted in the several district or circuit courts of the United States" (Ku Klux Act of April 20, 1871, ch. 22, §1, 17 Stat. 13), thus greatly expanding the federal courts' jurisdiction, which had previously generally been limited to cases in diversity, *see supra* n.2. The Congress that enacted what is now §1983 also fully understood that preemption injunction actions to enforce the Constitution were previously available where the courts had jurisdiction. *See, e.g.*, Cong. Globe, 42d Cong., 1st Sess. App. 420 (1871) (statement of Rep. Bright); *Osborn*, 22 U.S. 738.

Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) (preempted state law is "unconstitutional and void"). A cause of action to enforce the Supremacy Clause is thus only available to challenge state or local statutes, regulations, ordinances, or policies with the force of *law*.

By contrast, §1983 authorizes challenges not only to state laws, but also to deprivations of rights, privileges, or immunities by individual actions or failures to act by state officials "under color of" law, even when those actions or failures to act *violate* state or local law. *Monroe*, 365 U.S. at 172 (§1983 provides remedy for rights violations caused "by an official's abuse of his position," even if official violated state law). Section 1983 thus provides a mechanism for challenging a broad range of state and local action or inaction that does not have the force of law. *See, e.g., id.* (warrantless search and arrest); *Wilson v. Garcia*, 471 U.S. 261 (1985) (police beating). The Supremacy Clause does not reach so far – which was among the reasons why Congress felt the need to enact §1983. *See Monroe*, 365 U.S. at 172-83 (discussing legislative history).[15]

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[15] The United States points to *Blessing v. Freestone*, 520 U.S. 329 (1997), and *Suter v. Artist M.*, 503 U.S. 347 (1992), as cases "in considerable tension" with the availability of preemption injunction actions to enforce the Supremacy Clause. U.S. Br. 26-27. But those cases involved challenges to state executive branch *actions or failures to act*, not, as here, preemption challenges to the enforcement of state *laws or regulations*. *See Blessing*, 520 U.S. at 337, 345-46; *Suter*, 503 U.S. at 352. The parties in *Blessing* and *Suter* did not brief the possibility that plaintiffs' challenges could proceed under the Supremacy Clause, and thus the Court did not need to reach the question whether the actions challenged in those cases or any other state executive actions may amount to state "laws" subject to challenge under the Supremacy Clause. *Cf.* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 365-69, 375 (2004) (discussing Court's disparate approaches to challenges to state legislative and executive actions alleged to conflict with federal law).

3. The limitations this Court has applied to §1983 claims stem from the specific language of §1983, which applies to deprivations of "*rights, privileges, or immunities* secured by the Constitution and laws" of the United States. (Emphasis added.) *See Golden State*, 493 U.S. at 106 ("Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law.").

By contrast, the Supremacy Clause makes no reference to "rights." Rather, it declares that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. While the *Gonzaga* Court's focus on rights-creating statutory language in the context of §1983 follows from the text of §1983 itself, a similar analysis does not follow from the language of the Supremacy Clause, which focuses on the relationship between state and federal laws. *See Golden State*, 493 U.S. at 117 (Kennedy, J., dissenting) (in contrast to §1983, "[p]re-emption concerns the federal structure of the Nation rather than the securing of rights, privileges, and immunities to individuals").[16]

B. Implied statutory rights of action are distinct from injunction actions to enforce the Supremacy Clause

This Court's implied statutory right of action jurisprudence is similarly inapplicable to suits to enforce the

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[16] The United States places undue reliance on *Maine v. Thiboutot*, 448 U.S. 1 (1980). U.S. Br. 28-29. The Court in *Thiboutot* stated only that, in previous cases involving the Social Security Act (SSA), §1983 was "the exclusive *statutory* cause of action because . . . the SSA affords no private right of action against a State." 448 US. at 6 (emphasis added). The parties in *Thiboutot* did not brief the availability of a direct cause of action under the Supremacy Clause for injunctive relief. The *Thiboutot* Court also included, in a compilation of prior decisions, some cases that under *Gonzaga* could not be brought under §1983.

Constitution, including injunctive suits to enforce the Supremacy Clause.

Statutory rights of action, like §1983 claims and unlike Supremacy Clause injunction actions, permit both damages suits and challenges to actions or inactions that do not have the force of law. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 63-64, 65-66 (1992) (damages suit alleging sexual harassment, explaining that, where Court finds implied statutory right of action, it "presume[s] the availability of all appropriate remedies [including damages] unless Congress has expressly indicated otherwise").

And implied statutory actions go even further than §1983 claims, permitting suits against private defendants for entirely private action. *Cf. Building. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 229 (1993) ("[T]he Supremacy Clause does not require pre-emption of private conduct."). The Court's implied statutory right of action jurisprudence has developed primarily in the context of suits against private parties for damages – a broad category of cases all sharing no tie to the Supremacy Clause. *See, e.g., Cort v. Ash*, 422 U.S. 66, 68 (1975) (shareholder derivative suit for damages against corporate directors).[17] This line of authority does not gov-

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[17] *See also Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869, 2875-76 & n.1, 2881 n.5 (2010) (foreign investors' securities fraud damages suit against foreign banking corporation); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 152-53, 164-65 (2008) (investors' securities fraud damages suit against corporation); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167-68 (1994) (bondholder's securities fraud damages suit against indenture trustee); *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 288 (1993) (action for con-

(*continued . . .*)

ern this case, which just involves traditional equitable relief against government officials directly under the Constitution.

Even in cases involving public defendants, the statutes at issue in this Court's implied statutory right of action holdings applied to private actors as well, so the Court's conclusion also decided whether the statute created an implied right of action against private defendants. For example, in

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tribution by stock issuers against attorneys and accountants); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1086-88 (1991) (minority shareholders' damages action against corporation and directors); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 529, 532-33 (1989) (damages suit against union); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 136, 145-48 (1985) (beneficiary's damages suit against employee benefit plan fiduciary); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 525-26, 534-36 (1984) (shareholder derivative damages suit against investment company); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 377-80 (1983) (securities fraud damages suit against accounting firm); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632-33, 639-40 (1981) (suit for contribution against concrete firms); *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 82, 91-95 (1981) (employer's suit for contribution against union); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 762-64, 770-73 (1981) (employee's damages suit against university consortium); *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 13-16, 19-24 (1979) (shareholder derivative damages suit against investment adviser); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 562, 568-71 (1979) (damages suit against accounting firm); *Cannon v. University of Chicago*, 441 U.S. 677, 680 n.1, 688-709 (1979) (damages suit against private universities); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 466-68, 477-80 (1977) (minority shareholders' securities fraud damages suit); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 4, 9-10, 21, 24, 37-41 (1977) (damages action against competitor in corporate takeover contest); *cf. Astra*, 131 S.Ct. at 1345, 1347 (third-party-beneficiary damages suit against pharmaceutical companies alleging contract breach substantively identical to suit pursuant to implied statutory right of action).

Alexander v. Sandoval, 532 U.S. 275 (2001), although the defendant was a state official, the federal regulations that the plaintiffs alleged the official had violated were authorized by a federal statute (Title VI) that also covered conduct by private parties. *See also Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (environmental statutes that reached private conduct); *California v. Sierra Club*, 451 U.S. 287 (1981) (same).[18] Had the Court concluded that the statutes or regulations in these cases provided for an implied right of action, the holding would have permitted suits against private defendants. In contrast, Supremacy Clause actions by definition are only available to prevent public officials from implementing preempted state laws.

The Court's modern approach to implied statutory rights of action stems from a concern that permitting suits in federal court where Congress has not authorized them "runs contrary to the established principle that [t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . . and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 164-65 (2008) (quoting *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting)) (internal quotation marks and citations omitted). The long-established availability of preemption injunction suits to enforce the Supremacy Clause is fully consistent with these principles. Congress authorized the federal courts to exercise their traditional equitable authority, so long as the dispute otherwise fell within the limits of the court's jurisdiction. *Supra* at 15-17.

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[18] *Sandoval*, *Sea Clammers*, and *Sierra Club* all also involved challenges to state executive branch actions, not legislatively enacted laws. *See supra* n.15.

IV. CALIFORNIA'S PROPOSED LIMITATION ON SUPREMACY CLAUSE ACTIONS FOR PROHIBITORY INJUNCTIONS IS NOT SUPPORTED BY HISTORY, LOGIC, OR PRECEDENT

California urges that, if the Court recognizes any federal court authority to issue equitable relief directly under the Supremacy Clause, it should limit that authority to cases in which preemption is asserted as a sort of anticipatory defense, to forestall enforcement of state or local regulation. Pet. Br. 42-44. The case law does not support this limitation, and imposing it for the first time now would undermine the purpose of the Supremacy Clause.

As an initial matter, California is wrong that *Shaw* and other preemption cases that arose directly under the Supremacy Clause would still be viable §1983 cases were this Court to eliminate the Supremacy Clause injunction cause of action, because they involve individual "rights." Pet. Br. 42-43 & n.12. These cases involve statutes that do not contain the "rights-creating language" that this Court has deemed "critical." *Gonzaga*, 536 U.S. at 283-84 & n.3, 287.

ERISA's preemption provision, for example, simply states that ERISA "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan" (29 U.S.C. §1144(a)), and does not contain statutory language that would support recognition of any "right" under §1983.

Likewise, the National Labor Relations Act ("NLRA") does not contain any "rights-creating" language that would apply to employers. In contending otherwise, California relies on authority that predates *Gonzaga*, and thus reached a different result than would be required under current authority. *See Golden State*, 493 U.S. at 451 (acknowledging absence of statutory text securing "rights" under NLRA, but holding right to be free from regulation to be "implicit"). Moreover, even if it could

somehow be said that the NLRA, *sub silentio*, grants businesses a *Gonzaga*-type "right" to be free from regulation, it is implausible that the NLRA could be read also to grant a "right" to wrong-doers to avoid "supplemental sanction" for conduct concededly subject to federal prohibition and penalty, which was the issue in *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 283-84, 287-88 (1986) (state statute prohibiting state purchases of products from repeat NLRA violators preempted in injunctive suit brought by employer because statute imposed supplemental sanction on conduct regulated exclusively by federal government).

This would be equally true of the many federal statutes that, like the NLRA, contain *no* preemption language at all, much less rights-creating language, but have been held in preemption injunction suits to preempt state regulation. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973) (Federal Aviation Act and Noise Control Act preempted city ordinance regulating aircraft noise based on "pervasive nature of the scheme of federal regulation of aircraft noise," despite absence of express preemption provision); *Hines v. Davidowitz*, 312 U.S. 52, 68-74 (1941) (state alien registration law preempted by Federal Alien Registration Act).

Having established that preemption cases could not simply be brought under §1983, we turn to California's "anticipatory defense" theory.

A. The Court's preemption cases cannot be explained as all involving anticipatory defenses to state regulation or quasi-regulation

1. California's theory is that, even if no statutory "cause of action" is necessary to obtain injunctive relief under the Supremacy Clause, this Court has entertained preemption claims absent such a statutory cause of action only when

asserted in anticipation of state proceedings to enforce regulation of a plaintiff's conduct. Pet. Br. 43-44; *see also* U.S. Br. 19, 21-22; Nat'l Govs. Ass'n Br. 23-26. Initially, regardless of the truth of this proposition as a descriptive matter, no party or amicus offers a reasoned justification for limiting the force of the Supremacy Clause to this context.

Historical practice at the time the Supremacy Clause was adopted lends no support, for while traditional equity suits did include those to enjoin actions at law (as amici correctly point out, Nat'l Govs. Ass'n Br. 23-25), they were not limited to such cases.[19] Early authorities on injunctive relief noted that "[i]t would indeed be difficult to enumerate" all the categories of cases in which injunctions were available,

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[19] As previously discussed (*supra* at 12-15), suits seeking injunctive relief were generally available to prevent unlawful injury where there was no adequate remedy at law, including to redress or prevent injury from statutory violations. *E.g.*, *Bosanquett v. Dashwood, Forrester*, 39-40 (Ch. 1734) (suit in equity for refund based on usury statute where no action at law was available; "tho' a court of equity will not differ from the courts of law in the exposition of statutes; yet does it often vary in the remedies given, and in the manner of applying them"); *see also* 1 John Fonblanque, *A Treatise of Equity*, ch. 1, §3, pp. 13-15 (1793) ("Every matter . . . that happens inconsistent with the design of the legislator . . . may find relief" in equity); 1 Story § 10. Injunctive relief was also available, for example, (a) to enforce trust obligations, *e.g.*, *Attorney General v. Heelis*, 2 Simons & Stuart 67 (Ch. 1824) (commissioners appointed under act of Parliament to provide local public services held to be equivalent of trustees subject to injunction to administer funds as required by statute); *see generally* 1 Pomeroy §§151-55; (b) to prevent waste, *e.g.*, *Portues v. Tapham*, Case No. 30, *Registrar's Book of Governor Keith's Court of Chancery* (Pa. 1735); *Wightman v. Brown*, 1 S.C. Eq. Rep. 166 (1790); *Attorney General v. Mayor &c. of Dublin*, 1 Bligh 312, 324, 339 (H.L. 1827) (where water users brought suit to restrain levies by corporation of Dublin allegedly "not warranted" by statute permitting rebuilding and maintenance of water pipes, Lord Redesdale (previously John Mitford) held suit in equity proper because it "was necessary to enforce the proper application of the funds [as required by statute], and was in the nature of an injunction to

(*continued . . .*)

given "the endless variety of cases in which a plaintiff is entitled to equitable relief." Robert Henley Eden, *A Treatise on the Law of Injunctions* 2 (1821); *see also* 1 John Fonblanque, *A Treatise of Equity*, ch. 1, §3, p. 20 (1793) (with respect to jurisdiction of courts of equity, "in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles"). Consistent with these principles, suits to enjoin injurious actions taken by public officials were traditionally available in equity where the plaintiff was not threatened with any enforcement action at law. [20]

(. . . *continued*)
stay waste"); *see also* Mitford at 123-24; (c) to maintain the status quo pending trial, *e.g.*, *Gray v. Yeamans*, *Journal of the Grand Council of South Carolina, 1671-1680* (S.C. 1671) (reprinted in *Records of the Court of Chancery of South Carolina, 1671-1779*, at 57-58 (1950 ed.)); *Burnet v. Corporation of Cincinnati*, 3 Ohio 73, 73 (1827); *see* Mitford at 122-23; (d) to restrain nuisances, *e.g.*, *Hall v. Mason*, Callis, 262 (1621); *Attorney-General v. Forbes*, 2 Mylne & Craig 123, 129-30 (Ch. 1836) (in suit against county magistrates, Chancellor held that "individuals, who conceive themselves aggrieved, may come forward and ask the assistance of the [High] Court [of Chancery], to prevent a public nuisance, from which they have individually sustained damage"); and (e) to avoid a multiplicity of suits, *e.g.*, *How v. Tenants of Bromgrove*, 1 Vernon 22 (Ch. 1681); *Ewelme Hospital v. Andover*, 1 Vernon 266, 267 (Ch. 1684); Mitford at 127-28; *see generally* 1 Pomeroy §§243-75. This list is far from exhaustive.

[20] *See, e.g.*, *Hughes v. Trustees of Morden College*, 1 Vesey 188 (Ch. 1748) (injunction to prevent turnpike commissioners from digging on land leased by plaintiff); *Gardner v. Trustees of Village of Newbury*, 2 Johns. Ch. Rep. 162 (N.Y. Ch. 1816) (injunction against village trustees' diversion of stream running through plaintiff's land); *Rankin v. Huskisson*, 4 Simons 13 (Ch. 1830) (injunction prohibiting construction of buildings by Commissioners of Woods and Forests); *Belknap v.*
(*continued . . .*)

Moreover, the proposed limitation also is not accurate as a descriptive matter. This Court has routinely authorized Supremacy Clause preemption injunctions when the plaintiffs faced no possible threat of enforcement or regulatory proceedings. In *Foster v. Love*, 522 U.S. 67, 68-69, 74 (1997), for example, this Court held a state open primary law that would have permitted election of congressional representatives in October to be preempted by the federal statute establishing a uniform date for federal elections. *See also Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000) (state law restricting state purchases from companies doing business with Burma preempted because threatens to frustrate federal statutory objectives); *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476-78 (1996) (state law prohibiting use of funds for abortions challenged as preempted by Hyde Amendment); *Gould*, 475 U.S. at 283-84 & nn.1-2 (state statute prohibiting state purchases of products from repeat NLRA violators preempted); *Perez v. Campbell*, 402 U.S. 637, 641-43, 656 (1971) (Bankruptcy Act preempts state law automatically suspending driver's license for failure to satisfy judgment arising out of car accident that has been discharged in bankruptcy); *California Dep't of Human Res. Dev. v. Java*, 402 U.S. 121, 122-23, 135 (1971) (state law regarding timing of unemployment insurance suspension inconsistent with

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Belknap, 2 Johns. Ch. Rep. 463 (N.Y. Ch. 1817) (injunction to prevent canal commissioners from digging ditch that would drain pond and diminish water flow to plaintiff's mill); *Bromley v. Smith*, 1 Simons 8 (Ch. 1826) (injunction suit to prevent local treasurers from misapplying funds in manner inconsistent with act of Parliament); *Cooper v. Alden*, Harrington's Ch. Rep., 72 (Mich. Ch. 1838) (injunction prohibiting local officials from erecting buildings on public streets); *cf. Frewin v. Lewis*, 4 Mylne & Craig 249 (Ch. 1838) (reaching merits in suit to enjoin poor law commissioners from altering workhouse without local officials' consent); *see also supra* at 12-13.

Social Security Act plan provision); *Rosado v. Wyman*, 397 U.S. 397, 407, 415-16 (1970) (state law altering eligibility rules for welfare recipients inconsistent with Social Security Act Amendments of 1967).[21]

2. While California ignores the existence of cases where no enforcement proceedings could occur, the United States, recognizing that California's Supremacy Clause theory does not explain them, argues that cases such as *Crosby* and *Pharmaceutical Research & Manufacturers of America v. Walsh*, 538 U.S. 644, 649-50 (2003) ("*PhRMA*"), fall within another special, heretofore unrecognized, category where direct Supremacy Clause suits are authorized, because they involve, "in effect, [plaintiffs] asserting an immunity" from what were, "in essence, state regulatory requirements" directed at their "primary conduct." U.S. Br. 22-24 & nn.8-9. But even this creative addition to California's theory fails to explain numerous other cases in which this Court has entertained preemption claims involving disputes over government benefits, in which no such quasi-regulation argument could be made.

In *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), for example, the Court commented that, "[u]nlike . . . the main body of

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[21] Additional cases entertaining such Supremacy Clause preemption injunction actions on the merits include, *e.g.*, *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 248-51, 258-59 (2004); *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 649-50 (2003) ("*PhRMA*"); *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 319, 331-34 (1997); *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 649-50, 668 (1995); *Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 222, 232-33 (1993); *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 525, 545-46 (1979).

labor pre-emption cases, the case before us today does not involve any attempt by the State to regulate or prohibit private conduct in the labor-management field. It involves a state program for the distribution of benefits to certain members of the public." *Id.* at 532. Nonetheless, the Court entertained (and rejected on the merits) the employer's contention that the payment of benefits to striking employees was preempted by the NLRA and Social Security Act. *Id.* at 525, 529, 545-46; *see also Dalton*, 516 U.S. at 477-78 (Medicaid providers challenged state constitutional provision prohibiting use of funds for abortions in circumstances where Medicaid funding was authorized by Hyde Amendment); *Java*, 402 U.S. at 122-23, 135 (claimants challenged state law regarding timing of unemployment insurance suspension); *Rosado*, 397 U.S. at 407, 415-16 (welfare recipients challenged state law altering method of computing benefits).

The United States' novel attempt to carve out the cases presently before the Court also ignores this Court's decisions involving Supremacy Clause preemption challenges to state laws governing elections and other government practices that do not seek to regulate private conduct. In *Foster v. Love*, for example, the Court unanimously held that a Louisiana open primary law that permitted federal candidates to win election in October was preempted by the federal act establishing a uniform date for federal elections, in a challenge brought by Louisiana voters. 522 U.S. at 68-69, 74. And as previously discussed (*supra* at 9, 23), this Court stated in *Lawrence County* that a pre-emption challenge to a state law governing local governments' distribution of federal funds was cognizable in federal court. 469 U.S. at 259 n.6.

The United States also offers no legal or historical justification for its proposed distinction. No language in *Crosby*, *PhRMA*, or other relevant decisions explains that

preemption injunction actions under the Supremacy Clause are available only where the state action at issue "in essence" regulates private conduct. Rather, the decisions focus on the injury to or interference with federal interests that results from operation of the preempted state law. In *Crosby*, for example, this Court explained, "We will find preemption where . . . under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 530 U.S. at 372-73 (internal brackets and quotations omitted). The Court held the law invalid because, by imposing different economic pressure on Burma from that adopted by Congress, it undermined presidential authority and presented an obstacle to congressional purposes. *Id.* at 368, 373-74, 376, 378-82, 385.

Similarly, in *PhRMA*, the seven Justices who reached the merits of the preemption claim did not focus on whether an objective of the challenged program was to affect drug companies' conduct outside the Medicaid program. Rather, they disputed whether the curtailment of benefits through the preauthorization requirement would serve Medicaid-related goals, with the plurality concluding that it did and the concurrence/dissent reasoning that it would undermine congressional purposes to "burden Medicaid beneficiaries without serving a Medicaid goal." *Compare PhRMA*, 538 U.S. at 662-66 (plurality opinion), *with id.* at 684-87 (O'Connor, J., concurring in part and dissenting in part) (program preempted because not tailored to further Medicaid-related purpose and poses obstacle to purposes of Medicaid Act). *PhRMA*, *Crosby*, and similar cases are not distinguishable from this case in any relevant respect. At bottom, these cases all involve Supremacy Clause claims to enjoin allegedly preempted state laws affecting access to government benefits.

B. Recognition of California's proposed new limitation on preemption actions would undermine the purposes of the Supremacy Clause

The United States recognizes that preemption injunction actions "serve[] an important purpose in vindicating the supremacy of federal law." U.S. Br. 21 n.7. That purpose is implicated here, and would be ill-served by a rule that permitted States to defy federal law in ways that injure private persons while leaving those persons no legal recourse for asserting the supremacy of federal law.

If anything, the availability of private litigation to vindicate the supremacy of federal law is *more* important when no enforcement action could be brought. That is because a plaintiff who can raise a preemption defense will at least at some point be able to assert the supremacy of federal law and have the preemption issue adjudicated. A plaintiff who will face no enforcement action, by contrast, will simply lose benefits, be forced to vote in an unlawful election, or otherwise be injured by implementation of a preempted (and therefore void) state law. *See, e.g.*, *Foster*, 522 U.S. at 68-69, 74 (voters faced with unlawful early federal election); *Golden State*, 493 U.S. at 111-12 (employer faced with nonrenewal of taxi cab franchise in a case that could not, post-*Gonzaga*, be filed under §1983); *Gould*, 475 U.S. at 283-84 & nn.1-2 (employer faced with denial of state government contracts). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Absent prohibitory injunctive relief, a state can continue to implement a state law that conflicts with federal law, the Supremacy Clause notwithstanding.

V. CALIFORNIA WAIVED ITS PRUDENTIAL STANDING ARGUMENT, WHICH IS ALSO MERITLESS

California's tacked-on prudential standing challenge should be rejected. The *Dominguez* plaintiffs' Article III standing is not disputed; nor could it be. Absent an injunction, the challenged state statute would have caused the beneficiary plaintiffs to lose health care services and reduced payments to the provider members of the plaintiff associations. Pet. App. (No. 09-1158) 81-82, 172-74.[22] Prudential standing is not jurisdictional, and California does not claim to have challenged at any stage below the *Dominguez* plaintiffs' prudential standing. Pet. Br. 50 & n.19. Nor did California raise prudential standing in its certiorari petition. Under such circumstances, this Court should not reach the issue. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).[23]

In any event, a prudential standing challenge would be meritless. Respondents do not seek to assert the "rights" of the federal government; rather, Respondents raise a preemption injunction cause of action under the Supremacy Clause based on the injury that California's

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[22] Amicus APA Watch confuses the constitutional and prudential standing inquiries. Moreover, Respondents do not rely on a third-party beneficiary theory of relief here, or sue under a statutory scheme requiring exhaustion of administrative processes, so amicus' arguments are not on point.

[23] Even if prudential standing concerns had been properly raised, when (as here) the court below has ruled on the merits issues and the "applicable constitutional questions have been and continue to be presented vigorously and 'cogently,'" disposition of the case on prudential standing grounds "can serve no functional purpose." *Craig v. Boren*, 429 U.S. 190, 193-94 (1976); *see also Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

preempted enactments would otherwise inflict on them.[24] As this Court has explained, "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States" when those laws cause injury, and prudential standing does not prevent suits by individuals who are injured by "governmental action taken in excess of the authority that federalism defines." *Bond*, 131 S.Ct. at 2363-65 (analogizing also to separation-of-powers cases). Such claims "need not depend on the vicarious assertion of a State's [or, in this case, federal government's] constitutional interests . . . ." *Id.* at 2365.[25] California's argument to the contrary would foreclose prudential standing in any case in which plaintiffs assert that a federal statute that lacks rights-creating language nonetheless has preemptive force, thwarting vindication of important Supremacy Clause interests and exposing citizens to continuing harm from illegal government action.[26]

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[24] California apparently confuses the third-party prudential standing limitation doctrine as requiring plaintiffs to demonstrate a legal "right" within the meaning of §1983 or implied-statutory-right-of-action jurisprudence. Pet. Br. 51. But this Court has recently clarified that "the question whether a plaintiff states a claim for relief goes to the merits in the typical case, not the justiciability of a dispute, and conflation of the two concepts can cause confusion." *Bond*, 131 S.Ct. at, 2362 (internal quotation marks and citations omitted). Respondents claim an injunctive right of action under the Supremacy Clause, and assert claims based on injury to their own interests; any question as to their right to enforce the Supremacy Clause relates to the merits of this case, not prudential standing.

[25] *Bond* also rejects California's argument that plaintiffs who have suffered concrete injury from an unconstitutional statute assert a generalized grievance when challenging that statute. *See* 131 S.Ct. at 2366-67.

[26] Plaintiffs who clearly are not the intended beneficiaries of federal statutes often assert preemption claims. *See, e.g., Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 93-94, 108-09 (1992) (Occupational Safety and Health Act preempts state regulation of

(*continued* . . .)

Finally, even if the appropriate zone-of-interests analysis were to focus on the Medicaid Act rather than the Supremacy Clause, the text of §30(A) makes clear that both Medicaid beneficiaries and providers are among those Congress intended to protect, which is more than necessary to overcome a prudential standing challenge. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987) (zone-of-interests test "not meant to be especially demanding" and "there need be no indication of congressional purpose to benefit the would-be plaintiff"); *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488-89, 491-92, 499 (1998) (similar); *cf. Pennsylvania Pharmacists Ass'n v. Houstoun*, 283 F.3d 531, 538, 541, 544 (3d Cir. 2002) (en banc) (Alito, J.).

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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hazardous waste site employee training, testing, and licensing, in action brought by trade association of hazardous waste businesses); *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 275-79, 291 (1987) (rejecting on merits employers' claim that state statute requiring pregnancy leave is preempted by Title VII as amended by Pregnancy Discrimination Act).